IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAM MELNICK,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for violation of Section 371, Title 18, U.S.C., and from the several orders denying Appellant's motion for motion to dismiss (Transcript Vol A, Page 70), judgment and sentence (Transcript Vol 9, Page 1147) and for withdrawal of plea of guilty (Transcript Vol 10, Page 1157).

Appellant was indicted by a Grand Jury in the Southern District of California, Central Division on twenty counts for alleged violation of Section 1343, Title 18, U.S.C.

(fraud by wire); Section 2314, Title 18, U.S.C. (interstate transportation of money taken by fraud); Section 2, Title 18, U.S.C. (aiding and abetting); and Section 371, Title 18, U.S.C. (conspiracy); jurisdiction of the District Court rests upon Section 3231, Title 18, U.S.C. Judgment of conviction was rendered June 28, 1965 (Transcript Vol 9, Page 1147) upon Appellant's plea of guilty to Count 20 of the indictment (Transcript Vol 6, Page 702). Appellant was sentenced to imprisonment for three years on his plea of guilty to Count 20 of the indictment. The remaining counts were dismissed by order of Court (Transcript Vol 9, Page 1148). Motion for withdrawal of plea of guilty was made on July 26, 1965 and thereafter heard and denied on August 2, 1965 (Transcript Vol 10, Page 1157). Notice of Appeal herein was filed August 4, 1965 pursuant to Rule 37(a) (1) (2) of the Rules of Criminal Procedure, and the jurisdiction of the Court of Appeals rests upon Section 1291, Title 28, U.S.C.

STATEMENT OF THE CASE

Appellant was charged in the indictment with having on or about January 1, 1961 and continuing to on or about November 26, 1963 with Alfred H. Osborne, Sr. (Transcript Vol A, Page 3, lines 14 to 18) devising a scheme and

artifice to defraud investors and proposed investors and obtain money by way of investments and loans in a duo-rail rapid transportation system and American Spacemaster Development Corporation (sometimes referred to as duo-rail and Spacemaster, respectively). Appellant and co-defendant were also charged in the indictment with having made certain false representations and promises in soliciting such investors and proposed investors, which statements were charged to be false (Transcript Vol 1, Page 39, lines 6 and 7). That said scheme was transmitted by means of wire interstate by telephone communications having been made or caused to be made by the appellant and co-defendant in connection with the alleged fraudulent scheme (Transcript Vol, Page 42, line 7 to Page 48, line 21). Further that appellant aided and abetted in the transportation of certain moneys in interstate commerce, to wit: From Los Angeles County to Kansas City, Missouri (Transcript Vol 1, Page 48, lines 22 to Page 49, line 6), and that appellant conspired with co-defendant in commiting the alleged acts as outlined above (Transcript Vol 1, Page 49, line 7 to Page 53, line 6). The case was tried before a jury on 20 counts of the indictment and Appellant entered a plea of guilty to Count 20 of the indictment (Transcript Vol 6, Page 702, line 12 to Page 704, line 1). Whereupon

judgment of conviction upon Appellant's plea of guilty on Count 20 was rendered on June 28, 1965 and appellant was sentenced to imprisonment for three years (Transcript Vol 9, Page 1147, lines 22 to 24) and all remaining counts of the indictment were dismissed by order of Court (Transcript Vol 9, Page 1148, line 12). That on July 26, 1965 a notice of motion to withdraw plea of guilty was made and thereafter heard on August 2, 1965, at which time said motion was denied. (Transcript Vol 10, Page 1157, line 21). Notice of Appeal was filed August 4, 1965. This is the instant matter.

SPECIFICATION OF ERROR

The Court erred in denying Appellant's motion for withdrawal of a plea of guilty as appears in Volume 10, Page 1152, line 4 to Page 1157, line 21 as follows:

"THE CLERK: Item No. 4, case No. 32970-Criminal, United States of America vs. Sam Melnick. This is a hearing on motion of defendant Melnick to withdraw plea of guilty heretofore entered.

"MRS. ROOT: If your Honor pleases, Gladys Root appearing for Mr. Melnick. We have filed a substitution of attorneys previously, and, as your Honor knows, we were not the counsel at the time of the original proceedings.

Mr. Melnick is not here this morning. He was here on the date that the matter was continued by stipulation and, frankly, I don't know whether your Honor ordered a return of Mr. Melnick at that time. I don't believe so, since I come to think about it --

"THE COURT: It isn't necessary that he be here.

"MRS. ROOT: Very well.

"As far as any personal information, if your Honor pleases, I have nothing more than I have filed with your Honor in the original motions, the affidavits and the points and authorities, and we will submit the matter upon the documents as filed, unless your Honor has some question to ask of me that I can't answer.

"THE COURT: I have no questions.

"Mr. Barnett.

"MR. BARNETT: If it please the court, the court, I am sure, well remembers the entire proceedings that took place, and comments passed in the affidavit to the effect that it would be an injustice for Mr. Melnick to be bound by his plea of guilty in the light of what to him was a shocking sentence is in no respect a sufficient reason to withdraw a plea of guilty.

"The court is familiar with the facts of the case. The guilt of the defendant had been established. The plea

of guilty was entered after six or seven days of trial. I think it would be, actually, in this situation, a misuse of the court's discretion to grant the request to withdraw the plea of guilty.

"MRS. ROOT: May I be heard, please?

"THE COURT: Yes.

"MRS. ROOT: If your Honor pleases, I don't believe that that is the only reason that we have set forth as to why Mr. Melnick feels that he should have his opportunity of his day in court, as stated by Mr. Barnett. I call your Honor's attention to the matters as set forth in the motion, and there seem to be many in my way of understanding from what Mr. Melnick, and from what the witnesses have told me personally, and which, incidentally, if your Honor pleases, they wrote out themselves, the affidavits, and we have submitted those originals to you.

"It seems as though the paramount factor in this case was that the will and the decision to enter a plea of guilty by Mr. Melnick was not based upon altogether a voluntary -- not altogether, but was not based upon a voluntary decision in this regard: As I understand, he was led to believe, according to the information that I have submitted to your Honor, that, No. 1, he would be called as a government witness, that he would be called -- of course, whether it be a government witness or a defense witness,

to tell the facts in the case, and that the facts as he knew them were based upon the circumstance that he had been taken, so to speak, using the vernacular of the streets, or had been put upon by Mr. Osborne, and that after he had gotten into this, that he was as much a victim of Mr. Osborne as either of the two persons, or both of the two persons that amounted to complaining witnesses.

"If your Honor pleases, you will note that there are affidavits attached by these two complaining witnesses, Mrs. Yergin and a Mrs. Rabe. I might tell your Honor that both of these ladies came into my office clamoring for the situation of an opportunity to tell to your Honor what they did tell you in the affidavits, and to-wit, that they felt that Mr. Melnick was apparently a victim of Mr. Osborne the same as they were.

"I call your attention to the fact that it would seem to me, and I do not know what the evidence presented to your Honor was, other than what I have been told, that if it is true, as both Mrs. Yergin and the other lady says is true, and if it is true that their testimony did show that at no time any monies were given to Mr. Melnick, save and except for his expenses, of which they themselves knew that he had expended, and that the complaining witnesses

gave monies to Mr. Osborne, and it was Mr. Osborne who had lied, who had misrepresented materially and falsely at all times, and that Mr. Melnick went along only by a passive situation, because he, Mr. Melnick, believed Mr. Osborne, that certainly the facts alone that came before your Honor, in my opinion, would establish a good and meritorious defense for Mr. Melnick.

"THE COURT: Mrs. Root, the trial of Osborne, which Mr. Melnick attended daily, the evidence clearly showed that directly practically all of these fraudulent transactions were handled by Mr. Melnick, not Mr. Osborne. Of course, Mr. Osborne -- I might say, in the first place, that Mrs. Yergin is pretty close to the borderline of being a defendant hereself. Mrs. Yergin brought Melnick into this case, as I recall the evidence. Mrs. Yergin was the one that brought him in. The evidence, of course, did not show, and I doubt that she received any of the money that was taken from these people. There is no evidence that she did. When Melnick came into this case, it was Melnick who brought Osborne into the case. Mrs. Yergin brought Melnick in.

"These people were just a lot of suckers who were ripe for plucking, and it was really a rather pitiful thing, because they were retired people, old people, and

they had their savings. Some of them were school teachers, they had their savings that they had saved, and Mr. Melnick is the one who then brought Osborne in.

"Of course, Osborne is an old-time confidence man, and he was smart enough that he came in on the basis -- he never handled any of this money directly. He worked through Melnick. So when the money was collected, and it was all done very deliberately, Melnick would collect the money, and Melnick and Osborne would divide the money. The evidence throughout shows that to be the case.

"Osborne received a sentence of 15 years. Melnick was shown leniency. I don't mind telling you that Melnick was shown leniency, because Melnick came before this court, and at the time he entered his plea he was questioned by the court; he was not only questioned by the court, but he signed a statement, and because he did come before the court and indicated, stated his guilt, and that he was guilty and showed contrition, he was granted leniency and received a sentence of five years -- or three years, I guess it was, yes, three years.

"As far as Melnick was concerned, he was represented by a very able counsel throughout the entire proceedings, and his counsel not only remained here at his side during the time that he entered his plea, but his counsel remained

here at his side during the time that he entered his plea, but his counsel remained here at his side throughout the trial of this case.

"I frankly fail to understand what he possibly could be complaining about.

"I imagine that he probably thought that he would be called as a witness, and he probably thought that he might get probation. But I just could not grant probation in a case which clearly showed not only one transaction, but transaction after transaction where he took the money from these people. And it was a typical fraud case where they are never satisfied. As long as they could keep these people thinking that there was a chance -- if they found they had a little more money, they would take that from them. They would tell them, 'Well, $1500 more is needed.' They would get that $1500, and then they would find they had some more, and then they would take that.

"The motion is denied."

QUESTIONS PRESENTED

1. Did the Appellant understand what acts amounted to being guilty of the charge and the consequences of pleading guilty thereto?

2. Did Appellant plead guilty as a result of

3. Was Appellant misled into pleading guilty to Count 20 of the indictment?

4. Would a manifest injustice result if the Appellant's plea of guilty was allowed to stand?

A R G U M E N T

1. Did the appellant understand what acts amounted to being guilty of the charge and the consequences of pleading guilty thereto?

Federal Courts have consistently held that a defendant must be conscious of the particular acts which constitute a charge against him in a criminal prosecution. The understanding of these acts together with the understanding of the consequences of pleading guilty to the charge are so deeply ingrained in our federal concept of due process that our courts have been faced with resolving this issue.

One of the more recent United States Circuit Court decisions in which the issue was presented was Edwards v. United States of America, (1958) 256 F.2d 707 at 710.

In the Edwards case the construction of Rule 11, 18 U.S.C.A., Federal Rules of Criminal Procedure was in issue. The rule was stated as follows: "Understanding of the nature of the charge is indispensable to a valid plea of guilty thereto."

The Edwards case construing Rule 11 stated: "Note that under Rule 11 the Court must not only determine that the plea is voluntary, but must determine also that

the defendant understood the 'nature of the charge'; that the Court satisfied itself that appellant understood 'the meaning of the charge' and what acts amount to being guilty of the charge, and the consequences of pleading guilty thereto."

Appellant here respectively points out that appellant changed his plea of not guilty to guilty on Wednesday, May 26, 1965 (Transcript Vol 6, Page 702, line 5 to Page 704, line 10).

In a 20 Count indictment only Count 20 alleged conspiracy by Appellant Melnick and his co-defendant, Alfred H. Osborne, Sr. Still, the Court failed upon accepting Appellant Melnick's plea of guilty to Count 20 to specify Count 20 as the particular count relating to conspiracy.

The Court failed to point out to Appellant Melnick which particular acts, as alleged in the indictment, he was pleading guilty to and why those acts constituted the crime of conspiracy.

Although the Court apparently went to great lengths to question the voluntariness of Appellant Melnick's plea, it appears that the Court still failed in its duty to Appellant in that it failed to ascertain whether or not Appellant understood the nature of the acts.

It is respectively submitted that the Court had at its disposal at the time it accepted Appellant Melnick's plea some 701 pages of court proceedings and testimony from which source it could advise Appellant Melnick of:

A. The acts which constituted the crime of conspiracy.

B. The legal reason why these particular acts constituted the crime of conspiracy; and

C. The legal consequences of pleading guilty to these particular acts constituting the crime.

Bergen v. United States, 145 Fed.2d 181

Kadwell v. United States, 315 Fed.2d 667

Section 31 FRD #5, Feb 1963

2. Did Appellant plead guilty as a result of coercion and duress.

It is respectfully submitted that volumes have been written in the attempt to define what constitutes legal coercion and duress. The one point of agreement by all attempting to define the subject matter has been that "Where the free agency of a defendant to reason and then act upon reasoned conclusions has been destroyed for all practical purposes then the defendant has been subjected to coercion and duress."

In the instant case, the record is replete with evidence of the pressures and stress to which Appellant Melnick was subjected both before the trial and during the trial in the District Court below. (Transcript Vol 1, Page 144, line 25 to Page 145, line 3) (Transcript, Vol 1, Page 148, lines 10 to 21) (Transcript Vol 2, Page 167, lines 5 to 7) (Transcript Vol 2, Page 182, lines 13 to 20) (Transcript Vol 2, Page 281, lines 18 to 20) (Transcript Vol 3, Page 399, lines 18 to 22) (Transcript Vol 5, Page 617, lines 15 to 19) (Transcript Vol 5, Page 637, lines 2 to 10 and line 17).

It is respectfully submitted that outside of the record the wife and family of Appellant Melnick were threatened with force, violence and even death at the hands of co-defendant Osborne should Appellant Melnick testify against co-defendant Osborne during the course of the trial.

The inate force and violence in co-defendant Osborne was forcefully brought to the attention of the trial court when upon court instruction co-defendant Osborne was searched prior to the commencement of the trial before entering the courtroom to determine if he had any deadly weapons hidden on his person or in his briefcase just before entering the courtroom. (Transcript Vol 1, Page 15, line 25 to Page 30, line 7).

Therefore, when defendant Melnick withdrew his plea of not guilty it was as a direct result of natural fear for his family and himself.

"A sentence rendered upon a truly coerced plea of guilty is subject to collateral attack through habeas corpus, and is also amenable to proceedings under the statute respecting vacation of sentence, as are guilty pleas obtained through promises of leniency by the prosecution or those entered by the accused without knowledge of his rights."

Watts v. United States, 278 F.2d, 247

"To impose upon a defendant the alternatives, that if he persists in assertion of his right and is found guilty, he faces, in view of the trial courts announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term, amounts to coercion as a matter of law, warranting setting aside of conviction."

United States v. Tateo, 214 F. Supp. 560

"If it appears that a guilty plea is the product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertence, it must be vacated as void since it is violative of constitutional safeguards."

United States v. Tateo, 214 F. Supp. 560

United States v. Shailer, 202 Fed.2d 590

United States v. Roland, 318 Fed.2d 406

3. Was Appellant misled into pleading guilty to Count 20 of the indictment?

The events leading up to Appellant's change of plea clearly indicate that Appellant was led to believe that he would be called to appear as a Government witness against co-defendant Osborne. (Transcript Vol 7, Page 905 lines 6 and 7) (Transcript Vol 9, Page 1145, lines 11 to 18).

The state of mind of Appellant, after the continual subjection to the coercion and duress cited above, at the time of changing his plea was such that he felt he owed an obligation to his business partners Estelle Curry and Mrs. Rabe to afford them some measure of protection by changing his plea from not guilty to guilty to Count 20 of the indictment and thereby affording himself an opportunity to testify as to the true set of facts giving rise to the criminal complicity of co-defendant Osborne.

It is respectfully submitted that Appellant Melnick was misled into believing that a change of plea by him was a procedural necessity pre-requisite to his testifying as a Government witness in the case against co-defendant

Osborne.

United States v. Lias, 173 Fed.2d 685

United States v. Shueer, 194 Fed.2d 598

Futterman v. United States, 202 Fed.2d 185

United States v. Lester, 247 Fed.2d 496

Georges v. United States, 262 Fed.2d 426

Jares v. United States, 279 Fed.2d 652

4. Would a manifest injustice result if the Appellant's plea of guilty was allowed to stand?

It is respectfully submitted that because of the above cited coercion and duress, as well as the apparent misleading of the Appellant in regard to procedural requisites in trial, that a manifest injustice would result if Appellant's plea of guilty was allowed to stand in that he would for all practical purposes have been denied his day in court.

Under the Fourteenth Amendment to the United States Constitution, procedural due process is demanded for all defendants in criminal prosecutions. It is submitted that the United States Supreme Court in construing what constitutes Procedural Due Process has never envisioned a tight, four-square formula for spelling out the concept in terms of arithmetical precision. Just as the concept of manifest injustice has changed under the growth and pressures of socialogical development since our Founding Fathers wrote the Constitution, so must we recognize that apparent procedural due process as applied to a particular individual can

result in a manifest injustice when viewed in the light of special circumstances. Appellant believes that the record below adequately reflects the presence of such special circumstances.

It is respectfully submitted that the only real evidence presented against Appellant below was his own statement upon the change of plea from not guilty to guilty. This fact standing alone appears to be eloquent testimony to the fact that a manifest injustice will result by allowing the plea of guilty to stand when a demonstrated reasonable doubt of Appellant's guilty is so obviously present.

"Concept of 'manifest injustice' applicable under rule providing for withdrawal of guilty plea, permits judge greater latitude than requirements of constitutional due process, and while court might conclude that guilty plea was not involuntary or violative of due process, it might be of opinion that clear injustice was done and thus permit withdrawal of plea."

Pilkington v. United States, 315 Fed.2d 204

"Enough is shouldto create a doubt concerning the voluntariness of the guilty plea."

Pilkington v. United States, 314 Fed.2d 207

CONCLUSION

Wherefore, Appellant respectfully requests that the order denying the motion for withdrawal of the plea of guilty be overturned.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 18(g) OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard L. Brand
RICHARD L. BRAND